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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD JEROME LUJAN, Defendant and Appellant.	B283926 (Los Angeles County Super. Ct. No. LA018359)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill, and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Edward Jerome Lujan challenges the trial court's denial of his petition to reduce his conviction for commercial burglary to a misdemeanor under a provision of the Safe Neighborhoods and Schools Act, commonly known as Proposition 47. (Pen. Code, § 1170.18.)[1] The trial court denied Lujan's petition on the ground that resentencing him would pose an unreasonable risk of danger to public safety. Lujan contends that the trial court abused its discretion, arguing that the court applied an incorrect burden of proof of dangerousness and based its decision on unreliable hearsay. He also asks us to independently review the record based on his motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We affirm.

FACTS AND PROCEEEDINGS BELOW

On February 8, 1995, a jury convicted Lujan of one count of commercial burglary in violation of section 459. The prosecution alleged that in August 1994, he entered a Pic N' Save store with the intent to commit larceny, that he placed $55.90 worth of clothing into a backpack in his shopping cart and left the store without paying for it. At the time, Lujan had three robbery convictions, which were serious and violent felonies. (See §§ 667.5, subd. (c)(9), 1192.7, subd. (c)(19).) On February 9, 1995, the court sentenced Lujan to 25 years to life pursuant to the "Three Strikes" law. (§§ 667, subds. (b)–(i), 1170.12.)

On November 6, 2012, voters approved Proposition 36, the Three Strikes Reform Act of 2012, under which defendants convicted of two prior serious or violent felonies are subject to the 25-year-to-life sentence only if they commit a third felony that is *itself* dangerous or violent. (*People v. Superior Court (Kaulick)*

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

(2013) 215 Cal.App.4th 1279, 1285 (*Kaulick*).) Proposition 36 also allows prisoners serving life sentences for nonviolent and nonserious third strikes to petition for resentencing under the new law. (See § 1170.126.) On November 19, 2012, Lujan filed a petition to recall his sentence pursuant to this provision. Two years later, in November 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which reduced certain drug and theft-related offenses that previously were felonies or "wobblers" to misdemeanors. It also permitted inmates serving felony sentences for such newly-reduced misdemeanors to be resentenced based on the reclassification. (See § 1170.18, codifying Prop. 47, § 14, as approved by voters, Gen. Elec. (Nov. 4, 2014), effective Nov. 5, 2014; *People v. Valencia* (2017) 3 Cal.5th 347, 351.) On April 6, 2015, while his Proposition 36 petition was still pending, Lujan filed a petition to recall his sentence under Proposition 47.

The trial court denied both of Lujan's petitions on the grounds that "resentencing [him] would pose an unreasonable risk of danger to public safety." The court reached this conclusion on the basis of Lujan's criminal history, his disciplinary history while in custody, his failure to participate in rehabilitative programming and vocational training, and lack of a reliable re-entry plan.

Prior to the Pic N' Save burglary, Lujan had been convicted of at least 10 offenses as an adult and two offenses as a juvenile. Of his adult offenses, three constituted serious or violent felonies and four involved the use of weapons. Two of Lujan's strikes were armed robberies committed in 1986. Lujan also committed another robbery in 1990 during which he tackled the victim as she tried to run and smashed her face into the pavement, leaving her with a permanent scar. Lujan's remaining offenses included convictions for burglary, grand theft, driving under the influence, carrying a loaded firearm, and possession of controlled substances.

While he was serving his sentence, prison officials found Lujan responsible for 19 rules violations (RVR's). Eleven of these RVR's involved acts of violence. Lujan's most serious RVR occurred in 2011, when prison officials determined that he slashed a fellow inmate's neck with a metal razorblade taped to a piece of plastic. The Sacramento County District Attorney's Office declined to prosecute this offense on the ground that there was no reasonable likelihood of conviction. Proof of the offense, which Lujan denies committing, relied on confidential sources. Lujan's other RVR's include eight violations for committing battery, in addition to violations for participating in a riot, possessing weapons, fomenting violence, unlawful assembly, possession of alcohol, and use of a controlled substance. Two of the RVR's took place in 2016, after Lujan had filed his petitions for release under Propositions 36 and 47.

DISCUSSION

Lujan challenges the denial of his Proposition 47 petition, arguing that the trial court abused its discretion when it concluded that he poses an unreasonable risk of danger to public safety pursuant to section 1170.18, subdivision (b).[2] He contends that the court erred by basing its decision in part on unreliable hearsay, by citing case law dealing with parole hearings, and by applying an incorrect burden of proof.

A. *Background on Proposition 47*

In November 2014, California voters passed Proposition 47 in an effort to redirect prison spending to focus on violent and serious offenses. The proposition reduced most possessory drug offenses and thefts of property valued at less than $950 from

[2] Appellant does not challenge the trial court's denial of his petition for relief under Proposition 36.

felonies to misdemeanors. (Prop. 47, §§ 5–13.) It also provides those serving felony sentences for such offenses the opportunity to petition for resentencing. (§ 1170.18.) The only people categorically ineligible for resentencing are those who have committed serious crimes commonly referred to as "super strikes," such as murder, rape, or child molestation. (See § 1170.18, subds. (b)–(c); *People v. Hall* (2016) 247 Cal.App.4th 1255, 1262 (*Hall*).) If a petitioner is eligible for relief, the trial court must resentence him "unless the court . . . determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

For a petition to be denied on grounds of dangerousness, the prosecution must establish that a petitioner poses an unreasonable risk of danger to public safety based on a preponderance of the evidence. (See *People v. Jefferson* (2016) 1 Cal.App.5th 235, 240-241.) Such risk is determined when the court decides, under its discretion, that the petitioner is likely to commit one or more super strike offenses. (§ 1170.18, subd. (c).) Super strikes include sexually violent offenses, attempted homicide, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, and any serious and/or violent felony offense punishable in California by life imprisonment or death. (See § 667, subd. (e)(2)(C)(iv)(I)–(VIII).)

When determining dangerousness, the court may consider the petitioner's criminal conviction history; the petitioner's disciplinary record and record of rehabilitation while incarcerated; and any other evidence the court deems relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b); *Hall*, *supra*, 247 Cal.App.4th at p. 1262.) A defendant does not have the same evidentiary protections at sentencing proceedings as he has at trial. A sentencing judge may consider responsible unsworn or out-of-court statements concerning the convicted person's life and

characteristics as long as there is a substantial basis for believing such information is reliable. (*People v. Lamb* (1999) 76 Cal.App.4th 664, 683.)

B. *Defendant's Dangerousness*

Lujan contends that the trial court abused its discretion in determining that he presented an unreasonable risk of danger to public safety. He argues that the court erred by relying on prison records claiming that he stabbed a fellow inmate, when the only evidence tying him to the stabbing were the declarations of anonymous informants. Next, he argues that the court erred by relying on case law pertaining to parole hearings, which he claims are not directly relevant to petitions for relief under Proposition 47. He also argues that the court's finding of dangerousness is unsupported in light of factors indicating that he is not currently dangerous. We do not find Lujan's arguments persuasive.

Lujan asserts that the trial court violated his right to due process by denying his petition partly on the basis of unreliable hearsay evidence. In its memorandum of decision, the trial court justified its dangerousness finding in part on the ground that Lujan committed a prison rules violation by stabbing a fellow inmate in the neck in 2011. According to Department of Corrections records, prison officials relied on statements of confidential informants as evidence that Lujan was responsible for the attack. We disagree that the court erred by relying on this evidence. Section 1170.18, subdivision (b)(2) explicitly allows trial courts to consider a petitioner's disciplinary record in determining dangerousness under Proposition 47. Thus, the denial of Lujan's petition can be reversed only if the trial court's reliance on the record of the stabbing represented a violation of due process. Under the relaxed due process requirements of a Proposition 47 hearing, a trial court may rely on unsworn or out-of-court statements

concerning the convicted person's life and characteristics as long as there is a substantial basis for believing such information is reliable. (*People v. Lamb*, *supra*, 76 Cal.App.4th at p. 683; see also *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095.) In this case, although Department of Corrections officials relied on confidential informants, they conducted an investigation to test the veracity of the reports. They noted that the informants reported information independently of one another, and had provided accurate information in the past. Under the reduced due process requirements of a Proposition 47 hearing, this was sufficient to render the rules violation report and its conclusions admissible.

Next, Lujan contends that the trial court abused its discretion by relying on case law pertaining to parole hearings. In its memorandum of decision, the trial court cited *Kaulick*, *supra*, 215 Cal.App.4th 1279, in which the court noted that a decision denying resentencing under Proposition 36 on grounds of dangerousness is "somewhat akin to a decision denying an inmate parole." (*Id.* at p. 1306, fn. 29.) Lujan correctly points out that petitions for relief under Proposition 47 are not situated identically to those seeking parole, but we fail to understand how the distinction made a difference in this case. Although the two groups are not identically situated, they are sufficiently similar that case law from the context of parole hearings may be usefully applied in Proposition 47 cases.

Finally, Lujan contends that the trial court applied an incorrect burden of proof to the dangerousness determination. The court acknowledged that the prosecution bore the burden to prove dangerousness by a preponderance of the evidence (see *Kaulick*, *supra*, 215 Cal.App.4th at p. 1305) but stated that the court "need not itself find an unreasonable risk of danger by a preponderance of the evidence." If the court erred in its

description of the standard, it was only a single stray statement and does not require reversal. Elsewhere, the court stated that "[t]he People bear the burden to prove, by a preponderance of the evidence, that an eligible petitioner would pose an unreasonable risk of danger to public safety if resentenced," and that "[t]he court's dangerousness determination itself . . . is a discretionary one." This latter statement accurately described the standard of review. (See § 1170.18, subd. (b) [resentencing is required "unless the court, *in its discretion*, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety"], italics added.) Furthermore, the remainder of the trial court's memorandum of decision shows that the court carefully considered the evidence and reasonably concluded that resentencing Lujan would more likely than not present an unreasonable risk to public safety.

There was ample evidence to support this conclusion. Lujan's extensive and consistent criminal history dates back to 1979 and shows that he is a very dangerous person. Although his criminal history reflects his behavior decades ago, his record of frequent and serious rules violations while serving his current sentence shows that his prior history remains relevant. Lujan has the lowest possible CSRA score[3] of 1 on a scale from 1 to 5, but this is primarily a reflection of Lujan's age—at the time of his resentencing hearing, he was 54 years old. His Department of

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[3] The California Static Risk Assessment score (CSRA) considers factors such as age at release, gender, and number and type of total felony convictions to predict the likelihood that an offender will commit a felony within three years of release. The range is 1-low, 2-moderate, 3-high (at risk of drug offense), 4-high (at risk of property offense), 5-high (at risk of violent offense). (Cal. Code. Regs., tit. 15, § 3768.1).

Rehabilitation score,[4] which takes into account his behavior in prison, remains high. The rule violation for the neck slashing incident, even if it was not prosecuted as attempted murder, was sufficient to show that Lujan presents a risk of committing super strikes, and the frequent other offenses and lack of rehabilitation show that the risk has not abated.[5]

The trial court did not err by finding that resentencing Lujan would pose an unreasonable risk of danger to public safety. It used reasonable discretion in considering Lujan's criminal history, disciplinary history, lack of participation in rehabilitative programming, and lack of a reliable re-entry plan to conclude that he would pose an unreasonable risk to public safety if released.

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[4] The California Department of Rehabilitation (CDCR) score is an analysis of an inmate's overall prison behavior, which considers factors including age at first arrest, age at first CDCR reception, current term of incarceration, incarceration behavior, participation in work and rehabilitation programs, and the seriousness of the current conviction. (Cal. Code. Regs., tit. 15, § 3375 et seq.) The minimum score a life inmate can receive is 19. Scores decrease by two points every six-month period an inmate remains discipline-free. They also decrease by an additional two points if an inmate has at least satisfactory performance in work, school, or vocational training. Scores can increase up to 16 points per serious rule violation.

[5] Lujan argues that it was unreasonable for the court to conclude that he was likely to commit a super strike when he has never previously been convicted of one. But anyone who has been convicted of a super strike is ineligible for resentencing under Proposition 47. (See § 1170.18, subd. (i).) If it were impossible for a court to find that a prisoner who had never been convicted of a super strike was likely to commit one in the future, there would be no need for the court to determine dangerousness under section 1170.18, subdivision (b).

C. *Pitchess* Motion

"For approximately a quarter-century our trial courts have entertained what have become known as *Pitchess* motions, screening law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant's defense." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225, fn. omitted (*Mooc*); see *Pitchess, supra,* 11 Cal.3d 531.) To balance the defendant's right to discovery of records pertinent to his or her defense and, thus, to a fair trial, with the peace officer's reasonable expectation that his or her personnel records remain confidential, the Legislature adopted a statutory scheme requiring a defendant to meet certain prerequisites before a trial court considers his or her request. (*People v. Prince* (2007) 40 Cal.4th 1179, 1284–1285; *Mooc, supra*, 26 Cal.4th at p. 1227; see §§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043–1047.)

A defendant seeking to initiate discovery must file a written motion that includes "[a] description of the type of records or information sought," supported by "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." (Evid. Code, § 1043, subd. (b)(2) & (b) (3); *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019–1020.) "A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*).) To establish good cause, the defendant must present a "plausible scenario of officer misconduct . . . that might or could have occurred." (*Id.* at p. 1026.) A plausible scenario presents "an assertion of specific police misconduct that is both internally

consistent and supports the defense proposed to the charges." (*Ibid.*) Assessing credibility or persuasiveness at the *Pitchess* discovery stage is inconsistent with the statutory language. (*Ibid.*) The defendant's factual scenario "may consist of a denial of the facts asserted in the police report." (*Id.* at pp. 1024–1025.) Nevertheless, the defendant must request information with sufficient specificity to preclude the possibility that he or she is "simply casting about for any helpful information. " (*Mooc, supra,* 26 Cal.4th at p. 1226.)

If the trial court concludes the defendant has made a good cause showing for discovery, the custodian of records must bring to court all documents " 'potentially relevant' " to the defendant's request. (*Mooc, supra,* 26 Cal.4th at p. 1226.) The court examines the documents in chambers with only the custodian of records and such other persons he or she is willing to have present. (Evid. Code, §§ 915, subd. (b), 1045, subd. (b).) Subject to certain statutory exceptions and limitations, the court must disclose to the defendant " 'such information [that] is relevant to the subject matter involved in the pending litigation.' "[6] (*Mooc, supra*, at p. 1226; see also *Warrick, supra,* 35 Cal.4th at p. 1019.) We review a "trial court's ruling on a motion for access to law enforcement personnel records . . . for abuse of discretion." (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) If we determine that relevant material exists, we conditionally reverse the judgment and remand the

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[6] The trial court must exclude from disclosure: "(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought. [¶] (2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 . . . . [¶] (3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit." (Evid. Code, § 1045, subd. (b)(1)–(3); see also *Mooc, supra,* 26 Cal.4th at pp. 1226–1227.)

matter to give the defendant an opportunity to demonstrate prejudice from the nondisclosure. (*People v. Gaines* (2009) 46 Cal.4th 172, 182–185.)

With his Proposition 36 motion, Lujan filed eight *Pitchess* motions requesting disclosure of personnel records pertaining to 10 Department of Corrections employees. The trial court reviewed the relevant personnel records and found one record relevant for disclosure, but otherwise no relevant discoverable records. Lujan filed a supplemental motion with respect to the discoverable record, requesting additional information so that he could contact witnesses to the event and investigate the matter further. The trial court denied the motion.

Lujan has requested that we conduct an independent review of the trial court's ruling, and the People do not oppose this request. Our review reveals that no additional relevant materials appropriate for disclosure under *Pitchess* exist.

DISPOSITION

The trial court's order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.